



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:
Juvernaldo Cordon Cruz,

Debtor(s)

Juvernaldo Cordon Cruz,

Plaintiff(s)

v.

Bank of America, N.A. et al.,

Defendant(s)

Case No.: 2:14-bk-24085-NB

Chapter: 11

Adv. No.: 2:19-ap-01103-NB

**MEMORANDUM DECISION RE: MOTIONS
TO DISMISS FIRST AMENDED
COMPLAINT**

Hearing:

Date: November 5, 2019

Time: 2:00 p.m.

Place: Courtroom 1545
255 E. Temple Street
Los Angeles, CA 90012

Except as noted below, this Court is persuaded by the arguments in the motions of the Fay Parties and BofA (each defined below) to dismiss Debtor's First Amended Complaint ("FAC," adv. dkt. 45).¹ At the above-captioned hearing Plaintiff/Debtor

¹ Unless the context suggests otherwise, a "chapter" or "section" ("§") refers to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Code"), a "Rule" means the Federal Rules of Bankruptcy Procedure or other federal or local rule, and other terms have the meanings provided in the Code, Rules, and the parties' filed papers.

1 (“Debtor”) suggested that newly discovered information about an alleged loan
2 modification might establish grounds for a motion to further amend the FAC, but no
3 such motion has been filed by the deadline of November 26, 2019 set by this Court.
4 Accordingly, the dismissal of the FAC will be without leave to amend.

5 **1. BACKGROUND**

6 This Court previously dismissed Debtor’s original complaint (see adv. dkt. 30 and
7 39-40). Much of this Court’s reasoning in dismissing the original complaint (adv.
8 dkt. 30) applies again to the FAC.

9 Debtor filed his FAC on September 17, 2019. On October 1, 2019, Defendants
10 Fay Servicing, LLC (“Fay”), Wilmington Savings Fund Society, FSB, dba Christian Trust,
11 Not Individually But As Trustee For Hilldale Trust (“Wilmington”), and BSI Financial
12 Services, Inc. (“BSI”) (collectively the “Fay Parties”) filed their motion to dismiss the FAC
13 (the “Fay Parties MTD,” adv. dkt. 47, 48). On the same date Defendant Bank of
14 America, N.A. (“BofA”) filed its motion to dismiss the FAC (the “BofA MTD,” adv. dkt.
15 50). Debtor filed his opposition papers (adv. dkt. 57-59), and the Fay Parties and BofA
16 filed their reply papers (adv. dkt. 62, 63).²

17 **2. JURISDICTION, AUTHORITY, AND VENUE**

18 This Bankruptcy Court has jurisdiction, and venue is proper, under 28 U.S.C.
19 §§ 1334 and 1408. This Bankruptcy Court has the authority to enter a final judgment or
20 order under 28 U.S.C. § 157(b)(2)(K). See generally *Stern v. Marshall*, 131 S. Ct. 2594
21 (2011); *In re AWTR Liquidation, Inc.*, 547 B.R. 831 (Bankr. C.D. Cal. 2016) (discussing
22 *Stern*); *In re Deitz*, 469 B.R. 11 (9th Cir. BAP 2012) (same). Alternatively, the parties
23 have expressly or implicitly consented to this Bankruptcy Court’s entry of a final
24 judgment or order. See *Wellness Intern. Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015);
25 and see *In re Pringle*, 495 B.R. 447 (9th Cir. BAP 2013). See also adv. dkt. 17, pp. 4
26 & 6 and Rules 7008 & 7012(b) and 9013-1(c)(5)&(f)(3).

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28 ² Another defendant, National Default Servicing Corporation (“NDSC”), filed its own motion to
dismiss the FAC (the “NDSC MTD,” adv. dkt. 52, 53). Debtor did not file an opposition to the NDSC MTD,
and this Court granted the NDSC MTD on November 7, 2019 (adv. dkt. 65).

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2 **3. DISCUSSION**

3 **a. Legal Standards**

4 On a motion to dismiss for failure to state a claim (Rule 12(b)(6), incorporated by
5 Rule 7012), this Court generally must accept all factual allegations as true, but:

6 a complaint must contain sufficient factual matter, accepted as true, to state a
7 claim to relief that is plausible on its face. ... A claim has facial plausibility
8 when the plaintiff pleads factual content that allows the court to draw the
9 reasonable inference that the defendant is liable for the misconduct alleged.
10 ... Threadbare recitals of the elements of a cause of action, supported by
mere conclusory statements, do not suffice. [*Ashcroft v. Iqbal*, 556 U.S. 662,
678 (2009) (internal quotation marks omitted) (citing *Bell Atlantic Corp. v.*
Twombly, 550 U.S. 544, 570 (2007))]

11 This Court must consider not only the complaint itself, but also any documents
12 incorporated into the complaint and matters of which a court may take judicial notice.
13 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

14 **b. Analysis**

15 Debtor argues that he was not required to tender payments because he "has a
16 counterclaim" so "the tender and the counterclaim offset one another." Adv. dkt. 57,
17 pp.10:27-11:2 & p.11:13. But that is circular reasoning: Debtor points to no
18 "counterclaim" other than his claim for wrongful foreclosure, but the foreclosure is only
19 wrongful if (among other things) Debtor tendered payments and Creditors foreclosed
20 anyway, and Debtor fails to allege that he was ready, willing, and able to tender all the
21 missing payments (as modified by the stipulation), let alone that he actually did so.

22 Debtor argues in the alternative that he was not required to tender payments
23 because "it would be inequitable to impose such a condition" Adv. dkt. 57, p.11:3-5
24 & p.11:13. But Debtor fails to explain what is inequitable about foreclosing when Debtor
25 was not ready, willing, and able to pay his mortgage (as modified by the stipulation),
26 and when he did not actually tender the payments.

27 Debtor argues (Adv. dkt. 57, pp.12:20-13:3; FAC, p. 11, ¶ 46) that the signature
28 on one assignment among Creditors does not comport with California law:

1 When an attorney in fact executes an instrument transferring an estate in real
2 property, he must subscribe the name of his principal to it, and his own name
3 as attorney in fact. [Cal. Civ. C. § 1095 (emphasis added)]

4 But the assignment is signed “by Fay Servicing, LLC as attorney in fact,” and
5 Wilmington is listed right above the signature line. FAC, Ex. H (emphasis added).
6 Debtor asserts (FAC, ¶ 46, p. 11:22-27) that the signature line should read “its attorney
7 in fact” not “as attorney in fact” (emphasis added). Debtor cites no authority for this
8 argument, which is contrary to the plain meaning of the statute, and also contrary to any
9 common sense application of the statute. See Reply (adv. dkt. 63), p.3:11-23.

10 Debtor also asserts (FAC, p.11, para. 43 & 45) that the date on a form reflecting
11 a transfer of a claim (FAC, Ex. G) is different from the date of the transfer of the deed of
12 trust from BofA to Wilmington (FAC, Ex. F), but that is a non-sequitur. The date on the
13 notice of transfer of claim has no bearing on when the transfer of the security interest
14 actually occurred. See Reply (adv. dkt. 63), p.3:11-23.

15 **c. Creditors’ arguments that are not persuasive**

16 Creditors' alternative arguments that are not persuasive to this Court are as
17 follows. It bears emphasizing, though, that these are only alternative arguments, and
18 this Court remains persuaded by all of Creditors’ other arguments for dismissal.

19 First, this Court is not persuaded by Creditors' alternative argument that Debtor
20 was not substituted for the original borrower. For the reasons previously set forth (adv.
21 dkt. 30, p.6:5-20), Debtor was substituted (although the Fay Parties might not have had
22 notice of that fact until Debtor brought to their attention his stipulation with BofA).

23 Second, this Court is not persuaded the Fay Parties' argument that Debtor seeks
24 an advisory opinion in his claim for declaratory relief (adv. dkt. 47, p.22:24-28). There is
25 an actual controversy between Debtor and the Fay Parties regarding their alleged
26 refusal to accept his payments, and their foreclosure of the property in which he
27 asserted an ownership interest.

28 Third, this Court is not persuaded by the Fay Parties' statute of limitations
defense (adv. dkt. 47, p.17:11-17). Contrary to the Fay Parties' argument, the statute

1 would not start to run when the stipulation was entered into, because Plaintiff/Debtor
2 alleges that BofA continued to accept payments. Rather, the statute would have started
3 to run in December of 2016, when Plaintiff/Debtor alleges that his payments were
4 refused by the new loan servicer. See FAC (adv. dkt. 45), para.33-40, *and* Opp. to
5 MTD (adv. dkt. 59), pp.5:14-6:11.

6 Fourth, this Court is not persuaded to accept, for purposes of these proceedings,
7 Creditors' assertion that no payments were refused. See, e.g., MTD (adv. dkt. 50,
8 p.16:13-15) *and* Reply (adv. dkt. 62, p.5:13-24). This Court cannot resolve factual
9 disputes in the MTD context.

10 Fifth, this Court is not persuaded that Debtor had to specify the name of the
11 person(s) who made alleged oral misrepresentations reinforcing that, pursuant to the
12 stipulation with BofA, Debtor had been substituted for the original borrower. See MTD
13 (adv. dkt. 50, pp.11:28-12:1). Such alleged oral statements might or might not be
14 admissible at trial, but Creditors have not cited sufficient authority to disregard them in
15 this MTD context.

16 Notwithstanding this Court's rejection of the foregoing alternative arguments, this
17 Court remains persuaded by all of Creditors' other arguments. Debtor's FAC fails to
18 state a claim as a matter of law.

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1 **4. CONCLUSION**

2 Even after Debtor was effectively substituted as the borrower, he has failed to
3 allege that he was ready, willing, and able tender all payments, let alone that he actually
4 did so. Unsurprisingly, when the mortgage was going unpaid, Creditors foreclosed.
5 Debtor has not suggested any way in which he could further amend his FAC to state a
6 cognizable claim. Accordingly, the MTDs must be granted.

7 The Fay Parties and BofA are directed to lodge a proposed order on their
8 respective MTDs within seven days of entry of this Memorandum Decision on the
9 docket.

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24 Date: December 2, 2019


Neil W. Bason
United States Bankruptcy Judge